No. 280

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

PASQUALE J. ACCARDI, *et al.*,

Petitioners,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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CITATIONS

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BRIEF FOR RESPONDENT

Question Presented

A 1960 agreement settling a labor dispute abolished certain jobs. Employees with less than twenty years seniority were discharged with allowances scaled not in accordance with their seniority but in accordance with length of compensated service, as defined in the agreement, thereby excluding from consideration periods on furlough for any reason except employment incurred disability.

The question presented is whether Section 8 of the Selective Training and Service Act of 1940 overrides the

agreement and compels respondent to pay petitioners additional amounts on the theory that the period used to scale their allowances had to include the time they were furloughed for military service during World War II.

The Statute

Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, as amended, 50 U.S.C. App. (1946 ed.) § 308, provides in pertinent part as follows:

> "(a) Any person inducted into the land or naval forces under this Act * * * for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service * * * shall be entitled to a certificate to that effect upon the completion of such period of training and service, * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
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> * * * *
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> (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
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> * * * *

> (c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

When the Selective Service Act of 1948,* 62 Stat. 615, was enacted, Section 9(c)(1) reenacted *in haec verba* the provisions of Section 8(c) of the 1940 Act. At the same time a new section was added which had no counterpart in the 1940 Act, Section 9(c)(2), which provides:

> "It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

Section 9(c)(2) was viewed by its proponents as an affirmation of the "escalator principle". Senate Report No. 1286 (at p. 16), Committee on Armed Services, 80th Congress, 2nd Session. This principle was first announced by this Court in *Fishgold* v. *Sullivan Drydock & Repair Corp.*,

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* The 1940 Act governs the rights of petitioners, as they acknowledge (Pet. brief, p. 11, footnote 6).

328 U. S. 275, 284-5 (1946). This view of Section 9(c)(2) has since been confirmed by this Court. *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U. S. 265, 271 (1958); *Tilton* v. *Missouri Pacific R. Co.*, 376 U. S. 169, 175 (1964).

Statement

Petitioners are World War II veterans who were working for the respondent railroad as "oilers" on tugboats in New York harbor when they were inducted into military service in 1941 and 1942 (R4-5). Upon completion of this service they resumed working for the railroad in 1945 and 1946 and were restored to their former positions with the same seniority date they formerly had (*ibid.*).

Thereafter, most of the railroad tugboat fleet in New York harbor was converted from steam to diesel power and the railroads serving the harbor, including respondent, took steps to eliminate the oilers from the diesel tugs. This led to a strike in 1959 in connection with which the intervention of the courts was invoked (R5). (*Baltimore & Ohio R. Co., etc.* v. *United Railroad Workers*, 176 F. Supp. 53 (S.D.N.Y.), *reversed* 271 F. 2d 8. (2 Cir.), *vacated and remanded* 364 U. S. 278). The dispute was finally settled in 1960 by an agreement between Local 1463 of the Transport Workers' Union and the affected railroads. This agreement abolished the position of oiler on the diesel tugs and established (R9-13) a scale of separation allowances graduated in accordance with length of compensated service: oilers with less than twenty years seniority were discharged and received the separation allowance appropriate to their length of compensated service; oilers with twenty or more years seniority had the option to terminate their employment and take their allowance, or to remain as employees of the railroad.

Thus, the agreement used "seniority" to measure the right of an employee to retain his job and "length of

compensated service" to measure the amount of his separation allowance. It was recognized that "seniority" included periods of military service whereas "length of compensated service" did not (R5-6). Similarly, the time during which the employees were furloughed for non-military reasons (layoffs, leaves of absence, full time union employment, physical disability,* etc.) diminished "length of compensated service" but not "seniority".

Petitioner Accardi had twenty years seniority as defined in the agreement (R7, 14).** He elected nevertheless to resign and take the allowance. All the other petitioners had less than twenty years seniority and had no alternative. They all, including Accardi, received a separation allowance, the amount of which would have been greater had it been measured by seniority rather than length of compensated service (R6-7). They brought the instant suit to recover the difference, asserting that the respondent was constrained by the Selective Training and Service Act of 1940 to pay them separation allowances graduated only in accordance with seniority.

The United States District Court for the Southern District of New York granted judgment for petitioners on the cross-motions of both parties for summary judgment (229 F. Supp. 193; R19-24). The United States Court of Appeals for the Second Circuit reversed unanimously (341 F. 2d 72; R25-29).

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* Except for injuries sustained during the course of employment (R14).

** The statement in petitioners' brief (pp. 5-6) that all of them lacked twenty years seniority and were dismissed is inaccurate as respects petitioner Accardi.

Argument

The 1960 agreement was designed in good faith to settle the labor dispute which had flared up in 1959 as a result of the claim of the rail carriers in New York harbor that oilers were not needed on diesel tugs and that the carriers had the unilateral right to abolish the oilers' jobs (R5-6). These events occurred many years after petitioners had been restored to these jobs following completion of their World War II service. While they were in military service between 1942 and 1946, the collective bargaining agreement contained no provision for separation pay for any employee irrespective of his seniority or status. Indeed, the agreement in suit was the first which provided separation pay for any of respondent's employees (R16). Under it, oilers with less than twenty years seniority were discharged with a separation allowance proportioned to the length of their compensated service. Furloughs or leaves of absence taken at any time over the period of employment, whether for military or non-military (except employment incurred disability) reasons, diminished "length of compensated service" but not "seniority".* Thus, the agreement undertook to dispose of the claims of all employees in the disputed oiler classification by standards uniformly applicable to veterans and non-veterans alike. It contained no taint of hostility toward veterans (R17). *Cf. Aeronautical Industrial District Lodge* v. *Campbell,* 337 U. S. 521, 529; *Ford Motor Co.* v. *Huffman, et al.,* 345 U. S. 330, 336.

Petitioners claim that by virtue of Section 8(c) of the Selective Training and Service Act of 1940 the parties to the 1960 agreement were not free to measure the separation allowances by length of compensated service and

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* Petitioners' brief (p. 14) asserts that the record does not disclose how seniority was measured. The record does show, however, that seniority was measured from the date each petitioner was first employed by respondent to December 31, 1960 (R4, 5, 7, 11).

thereby exclude from the computation their periods of military service. Respondent submits that there is nothing in Section 8(c) or the judicial teaching construing it which supports this claim.

The Scope of Section 8(c)

Section 8(c) provides that a veteran restored in accordance with the requirements of the preceding subsection (to the job he left or one of "like seniority, status and pay") shall be (i) "considered as having been on furlough or leave of absence"; (ii) "restored without loss of seniority"; (iii) entitled to "insurance or other benefits" to which employees on furlough or leave of absence were entitled at the time of his induction into the service; and (iv) protected against discharge without cause for one year.

Petitioners base their claim on the requirement that the veteran be restored "without loss of seniority". This clause of Section 8(c) requires restoration of a returning veteran not only to the seniority he had at the time he left but to that he would have had on the seniority "escalator", had he remained on the job. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 284-5. Furthermore, although he may be discharged without cause after the expiration of one year following his restoration, his seniority status continues as long as he remains on the job. *Oakley* v. *Louisville & Nashville R. Co.*, 338 U. S. 278. Such rights, however, may be modified or divested on terms applicable without discrimination to veteran and non-veteran employees alike. *Trailmobile* v. *Whirls*, 331 U. S. 40; *Aeronautical Industrial District Lodge* v. *Campbell*, 337 U. S. 521; *Ford Motor Co.* v. *Huffman, et al.*, 345 U. S. 330. No purpose to prefer veterans over non-veterans of equal seniority should be read into the statute. *Trailmobile* v. *Whirls, ibid.* at p. 59; *Siaskiewicz* v. *General Electric Co.*, 166 F. 2d 463, 466 (2 Cir. 1948). While a veteran is entitled under the statute to job preferments which enure to

his seniority status, he is not entitled to those which depend on factors other than seniority. *McKinney* v. *Missouri-Kansa-Texas R. Co.*, 357 U. S. 265.

The first clause of Section 8(c) which treats the returning veteran as having been "on furlough or leave of absence" does not modify the second requiring his restoration "without loss of seniority" so that a veteran's time in service must be counted in fixing his seniority date. *Tilton* v. *Missouri Pacific R. Co.*, 376 U. S. 169; *Brooks* v. *Missouri Pacific R. Co.*, 376 U. S. 182. Save where the veteran's seniority date is in issue, however, the statute directs that during his period of military service he "shall be considered as having been on furlough or leave of absence". Indeed, this clause controlled one facet of the decisions in *Tilton* and *Brooks*. In those cases, promotions to journeyman status were automatic after a fixed period of apprentice service. Nevertheless, it was held that time in military service would not count towards this but that a returning veteran had to serve out the full period of apprenticeship on the job to earn promotion. Thus, for purposes of promotion he was treated as though he had been "on furlough or leave of absence". Only when promoted was he entitled to have his seniority backdated to reflect the time when he would have completed the apprenticeship service but for his military service and he is entitled to this only because when he was inducted into service "as a matter of foresight, it was reasonably certain that advancement would have occurred" (376 U. S. at p. 181).

No change in the scope of Section 8(c) was wrought by the adoption by Congress of the statement of policy which became Section 9(c)(2) of the Selective Service Act of 1948. The report of the Senate Committee on Armed Services (80th Congress, Report No. 1286) accompanying the bill stated with respect to veteran re-employment rights that (*ibid.* p. 15) "no important substantive changes have been made in the provisions of the 1940 Act". Section

9(c)(2) was specifically described as (*ibid.* p. 16) a "statement of policy regarding application of the 'escalator principle' ". This, of course, was the principle which had been announced by this Court in *Fishgold* (328 U. S. at p. 284). Some have thought* that there is an irreconcilable conflict between Section 9(c)(2), which requires that a veteran be restored with such status as he would have had "if he had continued in such employment", and 9(c)(1), (former 8(c)), which requires that the veteran "shall be considered as having been on furlough or leave of absence". The conflict is illusory. The opinion in *Fishgold* had expressly pointed out that a furloughed employee "has a continuing relationship with the employer" and that such temporary suspension of his work "commonly does not affect the continuance of his status" (328 U. S. at p. 287). And in *Aeronautical Lodge*, this Court recognized that the veteran was given "the status of one who has been 'on furlough or leave of absence' but uninterruptedly a member of the working force" (337 U. S. at p. 526).

Accordingly, whether or not it is read in the light of the congressional declaration of policy, Section 8(c) does not require that a veteran be treated for all purposes as though he had continued to work on the job while he was in military service. As the Court said in *Tilton* (376 U. S. at p. 181):

> "This does not mean that under §§ 9(c)(1) and 9(c)(2) the veteran, upon returning from service, must be considered for promotion or seniority purposes as if he had continued to work on the job."

Section 8(c) does not support petitioners' claim.

The provisions for separation allowances in this case in no way trespassed upon petitioners' rights under Sec-

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* E.g.: *Diehl* v. *Lehigh Valley R. Co., et al.*, 211 F. 2d 95, 99 (3 Cir. 1954), *rev'd* 348 U. S. 960.

tion 8(c). The parties did not choose to scale these allowances in proportion to seniority and there is nothing in the statute which can fairly be read as mandating any such choice. The statute does not purport to create a seniority system but accepts that established by the process of collective bargaining. *Aeronautical Industrial District Lodge* v. *Campbell, supra,* 337 U. S. at pages 526-27; *McKinney* v. *Missouri-Kansas-Texas R. Co., supra,* 357 U. S. at page 268; *Brown* v. *Watt Car & Wheel Co.,* 182 F. 2d 570, 572 (6 Cir. 1950). Nor does it undertake to dictate the benefits which shall accrue to seniority. The perquisites of seniority are fixed not by Section 8(c) but by the collective bargaining process.*

Sound principles of public policy require that they continue to be fixed by the collective bargaining process. The circumstances in the case at bar exemplify this. The rail carriers in New York harbor and Local 1463 of the Transport Workers Union were faced with an industrial crisis. The union wanted the oilers jobs continued. The railroads wanted them abolished. The separation allowances were the price the railroads had to pay to gain their objective. These allowances were in effect a lump sum settlement for the surrender by the oilers of further efforts to protect their jobs. The parties might have chosen a variety of logically defensible scales by which to measure the individual amounts. The objective presumably was to absorb the shock of job loss and to tide the employees over the period of readjustment. Thus the parties might have chosen to measure the separation allowances by the employee's age (as a presumed function of his difficulty in finding reemployment), the number of his dependents, a flat retraining allowance, total previous

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* Some job advantages such as work preference and order of layoff and recall are usually associated with seniority. *Tilton* (376 U. S. at p. 173). But even in these areas the precise role played by seniority is frequently subordinated to other qualifications. See *Bureau of National Affairs, Inc. Collective Bargaining Service,* Sections 60, 75.

earnings on the job, seniority, etc.* Any scale chosen had to be satisfactory not only to the union but also to each of the seven railroads involved which meant that as applied to each of them the cost could not exceed what each was willing to pay to achieve its objective. The parties chose "length of compensated service". Had they anticipated exposure to additional cost by claims such as are here asserted some other scale might have been negotiated or, perhaps, the achievement of industrial peace might, in this instance, have been imperiled altogether. The method of defining "length of compensated service" adopted by the contract clearly reflects the give and take of the bargaining process. It is an obvious compromise between an actual count of time on the job and a token sampling of such time. A sound national labor relations policy demands that the parties be free to negotiate such compromise. Congress has committed the nation to a labor relations policy which leaves the parties free "to make such concessions and accept such advantages as in the light of all relevant considerations, they believe will best serve the interests of the parties." *Ford Motor Co.* v. *Huffman, et al.*, 345 U. S. 330, 338.

We submit, therefore, that the decisive consideration here is that the agreement provided benefits to be awarded to individual employees on a basis other than seniority and that it was reached in good faith without in any way discriminating against either veterans or non-veterans (R 5, 17). The time of all oilers on furlough or leave of absence (except for employment incurred physical disability) was omitted in the calculation. The agreement complied not only with the spirit but also with the letter of Section 8(c), the first clause of which directs that a veteran "shall be considered as having been on furlough or leave of absence".

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* Severance Pay and Layoff Benefit Plans, U. S. Dept. of Labor Bulletin No. 1425-2, Chapter IV. Note that typical plans gear eligibility to service on the job. *Ibid* p. 30.

The significance of the "insurance or other benefits" clause of Section 8(c).

The Court of Appeals in arriving at the decision below reasoned that the separation allowances in suit are not a perquisite of "seniority" but are more akin to "other benefits" with respect to which veterans by virtue of the third clause of Section 8(c) are to be treated as furloughed employees. That clause provides that a veteran "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into the armed forces". Manifestly, that clause has no direct application here because no one was entitled to separation allowances of any kind at the time these petitioners were inducted into the armed forces. The clause does, however, have *a fortiori* persuasiveness because if a veteran is to be treated as a furloughed employee with respect to "other benefits" in existence at the time of his military service, he is certainly entitled to no higher priority of treatment with respect to "other benefits" initiated after his return.

In reaching its decision, the Court below relied on a series of prior decisions holding that "other benefits" include separation pay [*Seattle Star, Inc.* v. *Randolph*, 16 F. 2d 274 (9 Cir. 1948); *Hire* v. *E. I. duPont deNemours & Co.*, 324 F. 2d 546 (6 Cir. 1936)*] and vacation pay [*Alvado* v. *General Motors Corp.*, 229 F. 2d 408 (2 Cir. 1956); *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (2 Cir. 1948); *Siaskiewicz* v. *General Electric Co.*, 166 F. 2d 463 (2 Cir.

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* Petitioners cite the *Hire* case as in conflict with the decision below (Pet. Brief, p. 18). It is not. Two increments of severance (layoff) pay were involved. The veteran was held not entitled to the first because he was not on the job when it occurred. He was held entitled to the second because he qualified for it under the agreement.

1948)]. Other decisions in accord on vacation pay are *Foster* v. *General Motors Corp.*, 191 F. 2d 907 (7 Cir. 1951); *Brown* v. *Watt Car & Wheel Co.*, 182 F. 2d 570 (6 Cir. 1950); *Dougherty* v. *General Motors Corp.*, 176 F. 2d 561 (3 Cir. 1949).

Petitioners now claim that all of these decisions have uniformly misconstrued the "other benefits" clause. Their argument is that this clause does not apply to veterans after they have been restored to their civilian jobs but only while they are in military service. They assert (Pet. Brief, p. 20):

> "The 'other benefits' clause was added for the express purpose of entitling employees to receive, while in service, such benefits as their employers accorded employees on leave of absence",

and further (*ibid.*, p. 22):

> "The 'without loss of seniority' provision protected the veteran's rights upon restoration. But Congress also desired to give him certain protections while he was in the service. That is why the 'other benefits' language was added to Section 8(c)."

This interpretation simply cannot be reconciled with the plain language of the statute. The Act does not purport to give veterans any rights against their employers while they are in a military service. Section 8(c) by its express terms is applicable only to "any person who is restored to a position". Accordingly, the application of the "other benefits" clause to restored veterans cannot be read out of the law as petitioners seek to do. There remains the clear and valid distinction between "other benefits" and benefits associated with the "without loss of seniority" clause which was the foundation stone for the decision below.

CONCLUSION

For the reasons stated, the judgment in the Court of Appeals should be affirmed.

Respectfully submitted,

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December 1965.